which he assisted to establish, when their operation could be calculated only by the widest and most clear sighted circumspection. We rejoice in it, for it is, we doubt not, the most gratifying and appropriate reward, that could be offered to a spirit like his. In the beautiful phrase which Tacitus has applied to Germanicus, *fruitur fama ;* for he must be aware, that the ocean which rolls between us and Europe, operates like the grave on all feelings of passion and party, and that the voice of gratitude and admiration, which now rises to greet him, from every city, every village, and every heart, of this wide land, is as pure and sincere as the voice of posterity.

ART. VII.—*Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts.* By OCTAVIUS PICKERING, Counsellor at Law. Vol. 1 ; Containing the Cases from September Term, 1822, in Berkshire, to October Term, 1823, in Middlesex. Boston, Wells & Lilly. pp. 580.

IT is not our province to keep our readers thoroughly instructed in the laws, and make our review a substitute for a law journal. In this country the law is the only sovereign whose supremacy is acknowledged ; and as in monarchies and empires reports of the health of the king or emperor are often made to the public, as being a matter in which all his subjects are interested, so we owe it to the public to give occasional notices of any material circumstances affecting the state and condition of this sovereign of ours. Some of our readers may possibly be of opinion, that we perform this part of our duty with an over scrupulous fidelity, and, in this *legal dispensation*, impose upon ourselves, and upon them, some supererogatory labors. If it be so, and we lose sight of our proper objects by turning too often in pursuit of the law, it will be conceded to us, as some excuse, that we err on the safer side, for of all subjects that can occupy the community, none is more important, and of a more deep and lasting interest, than the character and state of our laws ; since no cause so intimately affects the dignity, prosperity, morals, and hap-

piness of the community, as the spirit and administration of those rules upon which the enjoyment of life, liberty, rights, and property, depend. But we do not now propose to occupy our readers with the subject of codification, nor to go into any elaborate disquisition, but merely to give a very brief notice of the volume of which the title is prefixed to this article; to which we are induced, in a great measure, by the circumstance, that it is the first published by the present reporter of the Supreme Court of Massachusetts.

Before speaking of our particular subject, we will, however, by way of further apology, premise a word respecting a complaint repeated very frequently of late in regard to law books. As long ago as the time of Solomon, it seems that 'there was no end of making many books;' and, some two thousand years since, the Greeks found 'much study to be a weariness,' as appears by their maxim that a great book is a great evil,—to the reader, they meant, no doubt,—and to one who must both purchase and read, the evil is doubled; and of this sort of evils, a law book is certainly not among the least. The men of the law seem to have suffered under more than their just share of this general and ancient calamity, if we may believe their lamentations over the ratio of their number of books, to that of their clients. On this ground we hear loud calls from many quarters for codes and abridgments. Men in the profession wish that books may, at some age or other, become obsolete; or at least that some device may be hit upon to bring this overgrown science within 'reasonable compass;' and men out of the profession, though not at all surprised that every one is not, and cannot be, an adept in theology, physic, natural philosophy, botany, &c. yet seem to be surprised that the law cannot be so abridged, simplified, and elucidated, that every boy leaving the public schools should be a good practising attorney; and that a learned, deep read counsellor at law, should not become a rare and useless curiosity.

We will not, however, enlarge upon these interesting subjects in this place, but remark merely that all which has been said upon them, by way of complaints and projects, shows no ground of objection to the publishing of reports. These exhibit an accurate and authentic history of the administration of the laws, of which it is of vital importance to the

well being of the community, that the public should have ample means to inform themselves. A barrister, who through the medium of the reports, addresses his arguments to the whole profession, both of the present and future times, feels a much stronger motive to make himself completely master of his subject, than if the knowledge of the case which he argues were limited to the court before which it is pending, and the auditors present. A judge, who knows that his decisions, with their reasons, will be recorded and made public, and compared with each other, and tested by those of other judges and courts of former and aftertimes, and yet is ready to throw out hasty conceptions and first impressions, in crude and loose propositions, must be indifferent to his own reputation, and public opinion, as well as regardless of right and wrong, and of his obligations to parties and the public. The practice of reporting decisions, with their grounds and reasons, is indeed an insuperable barrier to the corruption of judges; and what is of greater importance, (for in this country we are at an immeasurable distance from any fear of direct corruption,) it is the strongest possible guard against negligent and inconsiderate decrees. The motives, on the part of the court, to give able opinions, well fortified by reasons and authorities, are so much strengthened and enforced by the practice of reporting, that we may safely say that the judge, who, notwithstanding these motives, ventures to dispose of important and difficult questions, in a summary and superficial manner, must do so under the conviction that he is totally incompetent to an elaborate investigation, or from some constitutional or habitual disqualification for his place, which amounts to a moral necessity of deciding without weighing.

The publication of reports, again, affords the only means of informing the community of the laws by which their conduct is to be governed, and their rights to be determined, since the combined wisdom, talents, and experience of the country, if they could be brought to act in concert, and with the greatest advantages, upon the subject, could not frame a body of laws, which would anticipate and provide for all cases, and would not give rise to innumerable questions of interpretation; and the multitude of contracts, which men are continually making, and which a good system of legislation takes care to leave them free to make, is incessantly giving rise to questions of

construction; and the interpretations and constructions adopted by the courts are quite as important as the laws and contracts that give rise to them; they are in fact a part of the law, and it is as requisite that they should be fixed and made known, as that laws should be made and published. A people that has not the means of being informed of the decisions of its courts, and the reasons and principles of those decisions, may in truth be said not to have the means of knowing the laws by which they are governed. And the practice of publishing reports of adjudged cases is the only way of establishing these constructions, and interpretations, upon a secure foundation in the reasons and principles on which they are grounded, and in precedents, or in other words, recorded and recognised usages.

There are the same reasons for publishing reports of adjudged cases, as for publishing laws, and no expense incurred by a government is better bestowed, or goes more directly and effectually to promote the great and fundamental purposes of civil institutions, than the encouragement given for the publication of such reports. We were accordingly surprised at the difficulty recently made in the legislature of Vermont, in voting a sum of money for this purpose, and at the very small amount, (one hundred and fifty dollars if we recollect rightly,) that was deemed sufficient. It is still more remarkable, that some of the states give no encouragement at all to the publication and distribution of reports of judicial decisions, and in fact have no such reports. Others depend upon the voluntary labors of such lawyers, as may be disposed to undertake reporting, from hopes of reputation, and, in some instances perhaps, of a little profit, in respect to which the most modest expectation is in great danger of disappointment; or, if it be not disappointed, the profits afforded in our market by a publication of this description are in general so trifling, that if the reporter obtains for his time and labor, a recompense equivalent to the wages of a common daylaborer, he owes the public a debt of gratitude for their liberal patronage. But this is a very precarious way of supplying the community with the means of knowing by what laws and rules of conduct they are governed; and to depend upon it, is like a man's neglecting to provide for his household, trusting that a neighbor, induced by charity or some other

motive, will supply his neglect. Such a family has the prospect of being ill supplied, with the chance of being starved.

The office of a reporter is highly responsible and intensely laborious, and deserves a liberal compensation. It is the practice in the Massachusetts, as it is in the United States, and in many, and we believe most of the State courts, for the judges to give written opinions on the most important and difficult questions brought before them. The practice appears to be otherwise in most of the English courts, which gives the judges sometimes opportunity, and sometimes no doubt, occasion, to say, that the reporter must have mistaken the language of the court. The only objection to the practice of giving written opinions is the additional labor it costs the judges; but the manual labor of writing out an opinion is very trifling in comparison with that of making it up, and choosing and arranging the authorities and reasons on which it is founded; as every lawyer experiences as often he has occasion to give a written opinion. This inconvenience does not, therefore, outweigh the reasons in favor of this practice, inasmuch as it secures a more thorough and laborious consideration of questions on the part of the court, is an additional guard against crude and hasty opinions, and it checks the expression of broad and general propositions, under which indolence and inability are always ready to shelter themselves. Lord Ellenborough somewhere recommends the perusal of the earlier decisions upon a question then before the court, for the purpose of 'purifying the mind from the generalities' that had crept into the subsequent cases. These 'generalities' make it very easy to decide the pending question, as they afford a great space within which to bring it, or, to use a logical term, they furnish a very comprehensive *major*, which being once assumed, may be easily shown to include the *minor*, or particular question before the court; and the premises being conceded as a *που στω*, the conclusion is irresistible. But very soon another case will be offered to the court, which comes literally within this 'generality,' and yet too plainly requires a different decision. Accordingly this case is decided upon 'its particular circumstances,' or is considered to be an exception, and then another exception follows, until at length you have nothing but exceptions, and the rule disappears. The greatest talents,

learning, diligence, and caution cannot secure judges from occasionally laying down propositions in too broad terms. 'The attention of the court,' says Mr Justice Jackson, 'is naturally drawn particularly to the case before them; and though all that is said by them may be correct as applied to that case, yet when applied to another not then under consideration, it may, if adopted literally and in its whole extent, lead to results which the court did not anticipate, and would not have approved.' Whatever, therefore, puts the court on its guard against uttering propositions that lead to such results, is of great importance, and the practice of giving written opinions, to be published as a sort of testimony *in perpetuam memoriam*, is the most effectual guard for this purpose. And a reported opinion of a court ought to be written, or at least approved, by the judge to whom it is attributed, for the purpose of giving to it its just authority. And all the reasons in favor of opinions prepared in writing, by the court, and indeed, in favor of reporting opinions at all, may also be urged in favor of giving the name of the judge by whom the opinion is drawn up. Except in matters of practice, and the most distinct and insulated cases, in which the point decided, and the grounds and extent of the decision, cannot possibly be mistaken, we always regret to see *per curiam* prefixed to the opinion of the court.

Though the practice of giving written opinions upon all important questions abridges the labor, and still more the responsibility of the reporter, yet there is quite enough left for him to do and to be responsible for. He must, in the first place, select the cases to be deemed of sufficient interest and importance to publish, and those in which the facts, and grounds of the decision can be definitely and satisfactorily stated; and as he cannot make this selection beforehand, he is under the necessity of taking full and minute notes of all the cases argued. In many cases brought before a court for decision, the law of the case is so blended and confounded with the facts, that it is not possible for the reporter to extract from the whole case any precise definite point decided, or ground of decision. If the court assigns many distinct grounds of decision, without saying how far their opinion is determined by each, or whether any one ground is conclusive, there is nothing to report. Very often a decision turns wholly upon

a construction of facts, that are not likely ever to recur again in the same combination. It is in many instances worth while for the parties to present a question to the court, which yet is not so important and of such general interest, as to be a proper subject of a report. A reporter must of course depend upon the counsel and the court for his materials, but it can hardly be expected that the cases brought before a State tribunal are so stated and argued by the counsel, and so fully investigated by the court, and at the same time of such importance and interest, as to make it expedient to report them all. Provided the reporter exercises his own discretion, without too great influence of the court, in selecting cases to report, a publication of a third, or half, or at most two thirds of the cases argued and determined, is quite as useful as to publish the whole number. To select this third or half of the cases requires a very attentive examination of them all. To make a good selection of cases, in which not any of importance are omitted, and not any that would be superfluous, are reported, and to present perspicuous and satisfactory statements of the facts and the arguments of counsel, requires not a little talent, discrimination, labor, legal science and skill; and in all these respects Mr Pickering's volume is, as far as our information extends, entirely satisfactory to the profession, and gives him a just title to the reputation of an able reporter. We have not noticed any case in the volume which is not worth reporting. The cases are stated with great precision and perspicuity, and we have not met with an instance in which it was necessary to read the case a second time to be possessed of the facts. When one reads or hears a story well told, or a statement of facts well made, nothing seems more easy than to tell the story or make the statement, and yet it is a thing in which few people succeed. A lawyer has frequent occasion to regret the rareness, of this talent, when he finds himself obliged to grope his way to a knowledge of a case in an obscure wilderness of facts, spread over some three or four pages, without any arrangement, full of circumlocutions and repetitions, and presenting all together, not a case, but only the rude, undigested materials of one. The profession owes its thanks to a reporter who gives his cases in a succinct, lucid manner, and, at the same time, without omitting what is material; for he saves

them from the loss of money in purchasing a mass of surplussage, and from the loss of time in bringing together and arranging the *disjuncta membra* of the cases.

We have not found, in this volume, any instance of another fault sometimes to be met with in books of reports, where the reporter gives all the facts with sufficient minuteness, and hands over the subject to the judge, to begin where he began, and go over the whole story again; or at least as much of it as was necessary to have been told at all. We do not mean to imply that the excellence of a report is inversely as its length; wherever a material circumstance is omitted the report is useless, because it is impossible to know what was decided, and it is worse than useless, because it may lead to mistakes of the law, and will be perpetually cited in all cases of any affinity to it, for it will fit one almost as well as another. Not a few cases of this description, more especially of those at *nisi prius*, have been bandied at the bar, through all the successive generations of lawsuits, and may always continue to be brought into service to increase the array of authorities, and lend support to lame cases; for they cannot be confuted or overruled. In all cases of doubt, as to the materiality of facts, it is safer to err, if at all, by stating, rather than by omitting them. But there is no excuse for mere repetitions, and we have not observed any instance in which Mr Pickering needs any such excuse.

One of the most difficult parts of a reporter's labor is that of reporting the arguments of counsel. Some have doubted the expediency of giving much space to this part of a report, saying that the case and the opinion of the court present all that is decided, together with the authorities, and the grounds of the decision. In many cases, in some reports, as the Modern Reports and those of Dallas, on the contrary, the arguments of counsel are given, and the opinion of the court omitted; the reporter tells us that such and such were the arguments of counsel on each side, and such was the decree of the court, and leaves the reader to conjecture the grounds of the decision. The opinion is certainly to be preferred to the arguments, if one only is to be given; but it is better to report both where the question is difficult or important, and where there are both to be reported; for cases are sometimes submitted without argument, and sometimes decided by a naked

decree, the grounds of which are not stated. The practice of reporting the arguments is of great importance in its influence upon the character of the profession, and so upon the administration of the laws in general. When all the reasons and authorities presented by the counsel, on each side of a question, are made a part of the report, it puts the court under a necessity of fortifying their decision against the reasons and authorities adduced to the contrary, and thus guaranties a diligent examination of the subject. And then it is but just that counsel, while they are responsible for the presentment of the case, should have whatever credit they may be entitled to, on account of their research, and whatever of talent and ingenuity they display. In consulting an authority it is often of importance, in order to estimate its weight and bearing, to know how the question was presented to the court; and the arguments of the counsel not unfrequently throw great light upon the judicial opinion, and serve as a key to the meaning, application, and force of the expressions used by the judges.

The reason for reporting the arguments of counsel at all, also point out the proper mode of reporting them. There are not wanting instances of American cases in which the reporter favors his readers with a great deal of the declamation of the counsel, including rhetorical flourishes, flights of fancy, and *appeals* from the understanding to the imagination, all literally recorded with as great fidelity, as if the reporter were a sworn stenographer. This is to reduce the business of reporting to a sort of clerkship, in which the labor of the hand takes precedence of that of the mind. Arguments reported in this fashion are a double loss to the profession, who lose the money they pay for them, and also, in general, the argument itself, for they rarely read these interminable discourses, the contents of which remain, forever, a secret known only to the reporter himself. It is enough if he gives concisely and distinctly, all the positions taken by the counsel, with all the reasons and authorities by which he supports them; and to sift these out, and present them distinctly, concisely, and fully, is a work of great labor and difficulty, in which it requires much diligence and skill in the reporter, to be short, and at the same time satisfactory. In this part we think Mr Pickering's reports are exceedingly well made; no

lawyer can have consulted them without remarking the condensed, perspicuous, full, and elaborate manner, in which he has given abstracts of the arguments, throughout this volume. And we more particularly notice this part of his reports, for the purpose of confirming and increasing the public expectation and claims, in respect to subsequent volumes, since this is the part of a report over which a reporter is most likely to begin to drowse, unless his vigilance is excited.

Dean Swift's remarks on the importance of indexes, which he illustrates by a string of ludicrous comparisons of a book and its index, to a ship and the rudder, &c. are gravely applicable to the case of law books, of which the index is by no means the least important part. A book of reports, especially, if it be any treasure at all, is to most purposes a hidden treasure, except so far as its contents are disclosed by the index. It is not surprising, that persons conversant with this sort of publications should sometimes be disappointed in finding some things in the reports that are not in the index, and some things in the index, that are not in the reports; for to make a complete index, requires a clear perception of the points and bearings of the cases, great vigilance and patience in noting them all, and conciseness, precision, and perspicuity in expressing them; and as the reporter may suppose his case to be finished, before the abstract of it is made, he is very likely to make it in too great haste. We have not examined Mr Pickering's abstracts of his cases sufficiently to attest to the accuracy and completeness of all of them, but in a great number which we have examined, we have not met with instances of any that are slovenly, or obscure, or that do not satisfactorily express the points in the case; and we observe in some instances that he is particularly careful not to indicate a broader decision than the court makes. A few of the abstracts include a *perhaps*, and the cases fully bear it out; but we doubt whether it is not more secure both to courts and to those, who must adopt their decisions as authority, that the judges should limit themselves to the expression of their opinions and doubts.

In regard to the subjects of decision in these reports, we do not propose to go into any particular examination of any of them. Many interesting questions are presented to the court for adjudication; and the evidences of patient deliberation and laborious research discoverable in the opinions of

the judges, reflect honor upon this tribunal, and upon the state of which it is so important an institution, and so great an ornament.

There are in this volume three instances of decisions in pursuance of the opinion of a majority of the court, in opposition to that of two of the judges in one case, and that of the Chief Justice, in the others. In the first case, a deputy sheriff had, in levying an execution, seized the goods of a Mr Campbell, who thereupon brought an action of trespass against the deputy sheriff, in which he recovered a judgment, and by virtue of the execution issued upon this judgment, the deputy sheriff had been committed to gaol, whence he was discharged by order of law; and the judgment remained in full force and not satisfied; and the question was whether, after this, Campbell could maintain an action of trespass *de bonis asportatis* against the sheriff, on account of the same cause of action upon which he had already recovered a judgment against his deputy. Chief Justice Parker, and Justices Jackson, and Putnam, were of opinion that he could not; and so, accordingly, was the decision; Justices Thatcher, and Wilde were of opinion that he could maintain the action. The grounds of dissent, are given by Mr Justice Wilde. The second case, in which the court were divided, relates to the construction of the clause in the bill of rights prefixed to the Constitution of Massachusetts, and of the acts of the legislature, respecting the support of religious worship. Justices Thatcher, Putnam, and Wilde, were of opinion that if a person becomes a member of a religious society, without the limits of the parish in which he resides, and gives proper notice of this fact, he is not liable to pay any tax for the support of public worship in the religious society of the parish where he resides; whether the two religious societies be *of the same, or of different denominations;* and so the court decided. The Chief Justice was of opinion that an inhabitant of a parish is not, in this case, exempted from such tax, unless the religious society of which he becomes a member, is *of a different denomination.* Elaborate opinions are given in favor of these different constructions of the bill of rights, and the acts of the legislature.

The reporter has, in some few instances, added notes of authorities relating to the subjects of decision. The time that elapses from the giving of an opinion, until the publication

of the report of it, is not long enough to give an opportunity for many new decisions in other courts relating to the points involved in the cases reported, and it can hardly be expected of a reporter to go through all the indexes, in each case, to pick up what may have been overlooked by the counsel, on each side, and by the court; and accordingly but very few additions of this sort can be looked for. In one instance, p. 283, the reporter cites an additional case of some importance from Barnewall and Alderson, and subjoins—what we think might have been better omitted—a few remarks upon the question, whether the case in Barnewall and Alderson, if it had been brought under the attention of the court, would have influenced their decision. The reader is prepared to follow the editor of a book of reports, that has for some time been before the public, through a range of speculations, and arguments, as well as authorities, but there are many reasons why a reporter, more especially an official one, should confine himself, in the original publication of decisions recently made, to a report and references. The case cited in this instance is certainly very close, in its circumstances, to that decided by the court, and is well worth citing, and the remarks are so short, and at the same time so pertinent, that we should not have thought of excepting to their insertion, but for the practice that has been adopted by other reporters in a few instances, of appending distinct independent treatises to their reports, and thus blending things, which have very little connexion with each other; and making it necessary for many members of the profession to purchase treatises which they may not want.

ART. VIII.—1. *The Seventh Annual Report of the American Society for Colonising the Free People of Color of the United States; with an Appendix.* 8vo. pp. 176. Washington. Davis & Force. 1824.

2. *Correspondence relative to the Emigration of Free People of Color in the United States; together with the Instructions to the Agent sent out by President Boyer.* 8vo. pp. 32. New York. 1824.

THE history, designs, and operation of the American Colonisation Society have so recently been made topics of ample